

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -1 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re)	2 CA-CV 2009-0100
)	DEPARTMENT A
REAL PROPERTY LOCATED AT 4720)	
N. NESTING LANE)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20063345

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Albert B. Lassen

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By Brick P. Storts, III

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Attorneys for Appellant David Delich

H O W A R D, Chief Judge.

¶1 Appellant David Delich appeals the trial court's ruling denying his petition for compensation from certain proceeds from the forfeiture of a property located at 10905 North Camino de Oeste. For the following reasons, we affirm the trial court's decision.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the verdict reached by the trial court.” *In re 4030 W. Avocado*, 184 Ariz. 219, 219, 908 P.2d 33, 33 (App. 1995). Saguaro Restorations, L.L.C. (Saguaro)—a limited liability company whose members include appellant David Delich’s wife, Susan—owned an automobile repair business. In 2004, Saguaro sold the business to Ivan Castro and HFI Auto Group for \$300,000 but agreed to finance \$200,000 of the purchase price over the course of a five-year period.

¶3 Later, Castro and HFI defaulted on their promissory note payments to Saguaro. As a result of the default, Saguaro sued Castro and HFI for breach of contract. The suit eventually resulted in a \$200,000 judgment for Saguaro.

¶4 After Saguaro obtained the judgment against Castro and HFI, the state gave notice that Delich, in his personal capacity, was a possible party of interest in the forfeiture of assets that had been seized as the result of criminal activities. Delich subsequently filed a petition for compensation pursuant to A.R.S. § 13-4311(I), claiming he was an injured person entitled to compensation due to Saguaro’s judgment against Castro and HFI for breach of contract. Delich additionally claimed he expended personal money “as a result of being required to repossess the property where the [automobile repair] business . . . was located, in a foreclosure action.” In its response to Delich’s petition, the state agreed that Delich was entitled to compensation as an injured person. The state subsequently settled with Delich for \$80,000 in exchange for Delich’s waiver of

all claims as to the forfeited properties, with the exception of approximately \$124,372 from the proceeds of the sale of a forfeited property located on Camino de Oeste.

¶5 Delich then filed a second petition for compensation, requesting proceeds from the Camino de Oeste property. After a bench trial, the trial court denied Delich’s petition, finding “no connection or inter-relationship between the criminal activity that formed the basis of the forfeiture of [the] . . . Camino de Oeste [property] and the economic harm . . . Delich sustained in the sale of his business to Ivan Castro” and HFI. The court then ordered that the proceeds from the Camino de Oeste property be forfeited to the state. Delich appeals from this order.

Discussion

¶6 Courts will sua sponte examine a party’s standing to bring an appeal. *See Bennett v. Brownlow*, 211 Ariz. 193, ¶ 13, 119 P.3d 460, 462 (2005). To establish standing, a party must have “a particularized injury.” *Id.* ¶ 17. “Standing to raise an appeal is not equivalent to standing to raise a particular argument on appeal.” *Goglia v. Bodnar*, 156 Ariz. 12, 18, 749 P.2d 921, 927 (App. 1987); *see also Kerr v. Killian*, 197 Ariz. 213, ¶ 11, 3 P.3d 1133, 1136 (App. 2000). Delich may be a person aggrieved by the judgment because he did not receive the relief he requested. *See Ariz. R. Civ. App. P. 1.* But he also must show he has standing to raise the particular argument on which he relies. *See Goglia*, 156 Ariz. at 18, 749 P.2d at 927.

¶7 Delich claims he was entitled to proceeds from the Camino de Oeste property because he was an “injured person” as defined under A.R.S. § 13-4301(3). An “injured person” is defined as a person who (1) “has sustained economic loss . . . [(2)] as

a result of injury to his person, business or property by the conduct giving rise to the forfeiture of property.” § 13-4301(3). Pursuant to § 13-4311(I), an “injured person may submit a request for compensation from forfeited property.”

¶8 Delich claims he satisfies the test for determining who is an “injured person” because he sustained economic loss when he sold Saguaro Restorations to Castro and HFI. But Delich did not sell Saguaro Restorations in an individual capacity. Rather, Saguaro Restorations, L.L.C., a limited liability company, sold the business. And the subsequent \$200,000 judgment against Castro and HFI, on which Delich relies to establish the majority of his damage claim, was obtained on behalf of Saguaro, not Delich.

¶9 A limited liability company may “[s]ue and be sued, complain and defend its name.” A.R.S. § 29-610(A)(1). A member of the company, however, “is not a proper party to proceedings by or against a limited liability company unless the object is to enforce a member’s right against or liability to the . . . company.” A.R.S. § 29-656. Because Saguaro, not Delich, is the proper party, Delich lacks standing to bring the portion of his claim premised upon Saguaro’s judgment against Castro and HFI for breach of contract.

¶10 In supplemental briefing on the issue, however, Delich claims that he had standing to bring an action based on Saguaro’s judgment because he had personally acquired the assets of Saguaro Restorations. But, as he admits, these facts are not in the record. And it was Delich’s burden to show standing. *See Buckelew v. Town of Parker*, 188 Ariz. 446, 453, 937 P.2d 368, 375 (App. 1996) (“to be entitled to relief, [appellant]

must first prove his allegations of standing”). Delich further contends the issue of standing is *res judicata* by reason of his \$80,000 settlement agreement with the state. But, as Delich concedes, the settlement order in which the agreement was recited states that “the State of Arizona maintain[s] all defenses” to any subsequent claims made by Delich on the proceeds from the Camino de Oeste property. Accordingly, *res judicata*, now usually called claim preclusion, does not apply. *See Heinig v. Hudman*, 177 Ariz. 66, 71-72, 865 P.2d 110, 115-16 (App. 1993) (*res judicata* does not apply when court in first action reserved second action); *see also* Restatement (Second) of Judgments § 26(1)(b) (1982) (same); *cf. In re Estate of Kopely*, 159 Ariz. 391, 393, 767 P.2d 1181, 1183 (App. 1988) (“If a trial court or an appellate court expressly states that it is not deciding an issue which was raised and could have been decided, the presumption [of *res judicata*] cannot prevail, and the judgment is not *res judicata* as to the undecided issue.”).

¶11 Delich additionally contends, however, that he has standing to bring a claim based upon approximately \$50,000 in personal economic loss he claims stems from the foreclosure of the automobile repair business when Castro and HFI defaulted on their loan. But the majority of the personal loss claimed by Delich is not attributable to Delich personally but to either Saguaro or another limited liability company. The only alleged personal economic loss for which Delich may have standing to bring a claim is a \$5,750 fee paid to Home Loan Executives, which was billed to Delich personally rather than to a limited liability company. We will therefore address the merits of this discrete claim.

¶12 Delich argues the trial court erred in denying his petition for compensation because its decision is against the weight of the evidence. We will uphold the trial

court's factual findings unless they are clearly erroneous. *In re \$24,000 in U.S. Currency*, 217 Ariz. 199, ¶ 12, 171 P.3d 1240, 1243 (App. 2007); *In re U.S. Currency in the Amount of \$26,980.00*, 199 Ariz. 291, ¶ 15, 18 P.3d 85, 90 (App. 2000). And, as we explained above, to be entitled to compensation on this claim as an injured person, Delich must show he “has sustained economic loss . . . as a result of injury to his person, business or property by the conduct giving rise to the forfeiture of property.” See § 13-4301(3).

¶13 Delich’s “economic loss” or personal expenditures, however, stemmed from the foreclosure of the business due to Castro’s and HFI’s failure to make payments owed. The conduct that gave rise to the forfeiture of the Camino de Oeste property was the criminal activities of various individuals. The trial court did not clearly err in finding that Delich had failed to sufficiently establish a connection between Castro’s and HFI’s failure to make payments, i.e., Delich’s economic loss, and any outside criminal activities in which Castro and HFI might have engaged.

¶14 Delich also argues, however, that the trial court erred by “impermissibly reduc[ing] the scope of ‘conduct giving rise to the forfeiture of property’ [as defined] in A.R.S. 13-4301(3).” We review de novo the trial court’s interpretation of a statute as a matter of law. See *In re \$3,636.24*, 198 Ariz. 504, ¶ 10, 11 P.3d 1043, 1044 (App. 2000). Here, the trial court merely applied the plain language of the statute, as it must. See *Ariz. Dep’t of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, ¶ 45, 166 P.3d 934, 944 (App. 2007) (court is bound to apply statute as written).

¶15 In discussing the scope of the statute, Delich again argues that the trial court erred in its assessment of the evidence. But we have resolved the issue of the sufficiency of the evidence above and need not address it again here. Delich has not demonstrated that he sustained any economic loss as a result of Castro's and other HFI members' criminal conduct. We therefore affirm the trial court's denial of Delich's petition for compensation.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge